

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-7517/7580

United States Court of Appeals
FOR THE SECOND CIRCUIT

N. V. MAATSCHAPPIJ VOOR INDUSTRIELE
WAARDEN,
Petitioner-Appellee,
against

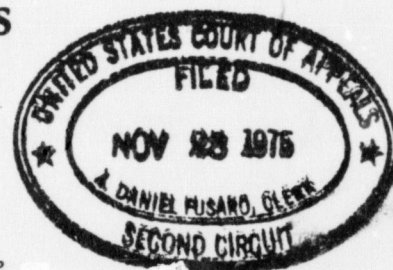
A. O. SMITH CORPORATION,
Respondent,
and
ARMOR ELEVATOR COMPANY, INC.,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR RESPONDENT-APPELLANT,
ARMOR ELEVATOR COMPANY, INC.**

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INDEX

Page

Statement of Issues.....	1
Statement of the Case.....	2
A. Orders appealed from.....	2
B. The License Agreement.....	3
C. The arbitration clause.....	4
D. Prior proceedings.....	5
1. Demand for arbitration.....	5
2. MVIW's petition and order to show cause.....	6
3. Armor's Answer, Counterclaim and Cross-Petition.....	7
4. Order entered August 6, 1975.....	7
5. MVIW's motion to stay court proceedings.....	8
6. Order entered October 14, 1975.....	8
E. Armor's Amended Answer, Counter- claim and Cross-Petition.....	9
F. Armor's counterclaims.....	10
G. Reasons for appeals.....	15

Argument:

Point I. The Court Below Erred by Failing to Determine Whether or not the Issues Raised by Armor are Arbi- trable.....	16
Point II. The Stay of Court Pro- ceedings by the Court Below Constitutes an Abuse of Judicial Discretion.....	19
A. Non-arbitrable issues are numerous and broad in scope and permeate entire License Agreement making it impossible for arbitrators to consider arbitrable issues only.....	19
B. A trial in the District Court will be required regardless of outcome of arbitration procee- dings.....	22

C. Illegality of License Agreement because of Antitrust violation is apparent on its face and vitiates entire agreement including the arbitration clause.....	23
Conclusion.....	26

CITATIONS

Cases:

A & E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9 Cir. 1968).....	17
Alco Standard Corporation v. Benalal, 345 F. Supp. 14 (E.D. Pa. 1972).....	17, 18
American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1963).....	17
Ansul Company v. Uniroyal, Inc., 448 F.2d 872 (2d Cir. 1971).....	25
Beckman Instruments, Inc. v. Tech- nical Development Corporation, 433 F.2d 55 (75th Cir. 1970).....	16
Clairol Inc. v. Cosmetics Plus, 184 U.S.P.Q. 234 (N.J. Sup. Ct. Chancery Div. Hudson Co. 1974).....	25
Cobb v. Lewis, 488 F.2d 41, 50 (5 Cir. 1974).....	19
Leesona Corp. v. Cotwool Mfg. Corp., Judson Mills Div., 204 F. Supp. 141 (D.S.C. 1962), aff'd 315 F.2d 538 (4th Cir. 1963).....	17

Cases (continued):

Page

Necchi Sewing Machine Sales Corp. v. Necchi S.p.A., 369 F.2d 579 (2d Cir. 1966).....	18
Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 1068 (9 Cir. 1970).....	17
Redd v. Shell Oil Co., 184 (U.S.P.Q. 675 (D. Utah, 1974)).....	25
Ring v. Spina, 148 F.2d 647, 650 (2 Cir. 1945).....	25
Southern Construction Co. v. United States ex. rel. Samuel J. Pickard, 371 U.S. 57 (1962).....	18
United States v. Eastport Steamship Corp., 255 F.2d 795, 803 (2d Cir. 1958).....	18
United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973).....	25
United States v. Schwinn Co., 388 U.S. 365 (1967).....	25
Varo v. Comprehensive Designers, Inc., 504 F.2d 1103 (9 Cir. 1974).....	25
Wyatt Earp Enterprises v. Sackman, 157 F. Supp. 621 (S.D.N.Y. 1958).....	22

Statutes and Regulations:

Page

15 U.S.C. 1.....	11, 13
15 U.S.C. 15.....	11
15 U.S.C. 22.....	11
28 U.S.C. 1338(b).....	11
New York General Business Law	
§§340 et seq.....	11, 13, 25
Fed. Rule Civ. Proc. 13(a).....	18

Miscellaneous:

6 C.J.S. Arbitration §29.....	19
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-7517 and 75-7580

N. V. MAATSCHAPPIJ VOOR INDUSTRIELE
WAARDEN,

Petitioner-Appellee,

v.

A. O. SMITH CORPORATION and ARMOR
ELEVATOR COMPANY, INC.,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE RESPONDENT-APPELLANT,
ARMOR ELEVATOR COMPANY, INC.

STATEMENT OF ISSUES

1. Whether the court action initiated by the respondent-appellant which asserts numerous non-arbitrable issues pertaining to antitrust and patent law violations and misrepresentation arising out of the License Agreement and seeks money damages was properly stayed by the

District Court pending completion of arbitration proceeding of limited issues within the scope of the arbitration clause in spite of the fact that the non-arbitrable matters are numerous, involve threshold issues, are broad in scope and permeate the entire License Agreement making it impossible for the arbitrators to consider only the narrow arbitrable issues and that a trial in the District Court will be required regardless of the outcome of arbitration.

2. Whether the District Court erred in failing to determine whether or not the issues raised by respondent-appellant are arbitrable prior to the start of arbitration proceedings.

STATEMENT OF THE CASE

A. Orders appealed from.

Respondent-appellant, Armor Elevator Company, Inc., (Armor) has appealed from two orders of the United States District Court for the Southern District of New York (Bonsal, D. J.), the first of which, entered on August 6, 1975 (A. 173),^{1/} directed the arbitration of certain disputes raised by MVIW arising out of a patent license and know-how agreement, but failed to determine whether or not various counterclaims

^{1/} "(A)" references are to respondent-appellant's Joint Appendix filed herewith.

raised by Armor were arbitrable. The second order appealed from, dated August 14, 1975 and entered on October 15, 1975 (A. 212), stayed all further court proceedings on Armor's counterclaims until completion of the arbitration proceeding and ruled that the antitrust issues would remain with the Court (Endorsement to order dated October 14, 1975, A. 217).

B. The License Agreement.

N. V. Maatschappij Voor Industriële Waarden (MVIW), the petitioner-appellee herein and Armor entered into a License Agreement dated October 1, 1973 (A. 17) under which MVIW agreed to grant Armor an exclusive license to use certain patents in the "Territory" which includes the United States, its possessions and Canada (A. 20). MVIW also agreed to furnish know-how pertaining to the manufacture and installation of the licensed products that would fulfill the specifications set forth in the agreement (A. 59).

Armor, in turn agreed to pay MVIW the initial sum of \$75,000 (Australian) and certain royalty payments thereafter for the term of the License Agreement. To date Armor has paid the initial \$75,000 (Australian) payment and minimum royalty payments in the sum of \$12,500 (Australian) but no licensed

product has been manufactured because, Armor claims, the know-how furnished is insufficient to meet necessary performance specifications set forth in the License Agreement and because the licensed products, even if they could be manufactured according to the know-how furnished to date, would violate the patents of others in the United States and Canada, a claim which has been further complicated by a letter received from Westinghouse of Canada, Ltd., dated April 29, 1975 claiming a probable infringement of its patents (A. 128 et seq).

C. The arbitration clause.

Article XI of the Licensing Agreement dated October 1, 1973 (A. 50), contains the following unique and limited arbitration provision:

"Section 1. In the event of any breach or threatened breach of this Agreement by either party it is mutually agreed that there is no adequate remedy at law in favor of the other party and that a suit for specific performance or for injunctive relief would be the only effective remedy for such latter party and nothing contained in Section 2 of this Article XI shall limit or preclude such right of specific performance (sic) and injunction, it being agreed that such rights are paramount and that the provisions of Section 2 of this Article XI are subject and subordinate to the provisions of this Section 1.

"Section 2. Subject and subordinate to the provisions of Section 1 of this Article XI, any unresolved difference or dispute between the parties concerning the obligation to make pay-

ment of any amounts of money provided for in this Agreement or relating to the meaning or application of the provisions of any of the Articles of this Agreement shall be submitted to arbitration . . ."

D. Prior proceedings.

1. Demand for arbitration.

On June 17, 1975 MVIW served a notice and demand for arbitration (A. 111) upon Armor and A. O. Smith Corporation (Smith). Smith by written guaranty dated October 1, 1973 (A. 89) guaranteed to MVIW the due performance and prompt payment of all obligations undertaken by Armor in and by the License Agreement.

In the demand for arbitration MVIW designated its arbitrator and requested Armor and Smith to designate their arbitrator. The nature of the dispute was described as follows:

"Breach of the License Agreement dated October 1, 1973, the performance of which and the payment of all obligations thereunder are guaranteed by A. O. Smith Corporation, including the failure to fulfill the obligation to develop and market the licensed products or gearless elevators embodying the licensed products or embodying the know-how

conveyed pursuant to the Agreement and the failure to pay required royalties; divulgence of confidential know-how to a competitor and attempted sublicensing in violation of the Agreement dated October 1, 1973; conspiracy to keep licensed products off the U.S. and Canadian markets while at the same time precluding licensing by claimant of others." (A. 111).

2. MVIW's petition and order to show cause.

On June 24, one week later, Armor and Smith not having appointed an arbitrator or participated in the arbitration, filed its petition for an order compelling arbitration of the disputes among the parties pursuant to 10 U.S.C. §4 in the District Court and obtained an order to show cause signed by Hon. Dudley B. Bonsal, United States District Judge on June 24, 1975 (A. 163) ordering Armor and Smith to show cause why an order should not be made directing them to proceed with arbitration and restraining them from divulging certain know-how.

The petition and show cause order were served on Friday, June 27, 1975. (Affidavit of William J. Pastore sworn to November 14, 1975 heretofore filed with this Court in opposition to petitioner-appellee's motion to dismiss.)

3. Armor's Answer, Counterclaim and Cross-Petition.

On the return date, Armor and Smith served their responding papers which answered the petition, set forth Armor's various counterclaims and defenses and cross-petitioned the District Court to retain jurisdiction to hear and determine all of the matters raised by the respondent therein (Respondent's Answer, Counterclaim and Cross-Petition, A. 119).

Armor's Answer, in addition to seeking money damages for various breaches of the License Agreement by MVIW sought a declaratory judgment that the agreement was illegal, null and void as an undue restraint on trade and against public policy (A. 135).

MVIW by ex parte orders dated July 7, 1975 and July 23, 1975 (A. 159, A. 161) had its time to answer or otherwise move with respect to Armor's Answer extended until ten days after the entry of the District Court's order upon MVIW's motion to compel arbitration.

4. Order entered August 6, 1975.

By opinion filed July 24, 1975 and order entered August 6, 1975, Judge Bonsal directed Armor (but not Smith) to proceed to arbitration upon all issues raised by MVIW except

for the conspiracy issue (A. 163, A. 173). The Court did not, however, rule upon the arbitrability of the issues raised by Armor in its counterclaims. The order entered August 6, 1975 is the subject of the appeal in Docket No. 75-7517.

5. MVIW's motion to stay court proceedings.

On August 15, 1975, petitioner moved to strike Armor's Answer, Counterclaim and Cross-Petition and to stay the court proceeding pending completion of the arbitration proceeding (A. 177).

Armor, thereafter served its Amended Answer, Counterclaim and Cross-Petition supplementing its original pleading (A. 180) and cross-moved to stay the arbitration proceedings (A. 205).

6. Order entered October 14, 1975.

By order entered October 14, 1975 Judge Bonsal directed a stay of all further court proceedings pending the completion of arbitration proceedings directed by the order of that Court entered August 6, 1975 and denied all other motions with leave to MVIW to answer or otherwise move with respect to Armor's Answer and Amended Answer upon completion of arbitration.

Prior to the entry of the October 14, 1975 order, Armor moved for reargument of the motions (A. 210) based upon the fact that the Court failed to consider that the License Agreement was, on its face, an illegal restraint of trade, a fact which had been set forth in detail in Armor's Amended Answer, along with numerous other antitrust law and patent law violations that were not as apparent on the face of the License Agreement.

In response to the motion to reargue Judge Bonsal, by Endorsement to the October 14, 1975 order, directed that the antitrust issues would remain with the Court (A. 217). The order entered October 14, 1975 is the subject of the appeal in Docket No. 75-7580.

E. Armor's Amended Answer, Counterclaim and Cross-Petition.

Armor prepared its original Answer between Friday, June 27, 1975, the date it was served with the petition and order to show cause and Monday, June 30th, the return date. A great many facts had to be reviewed and issues and counter-claims had to be framed during that short time span. In an effort to avoid any misstatement of fact or of Armor's position with respect to its claims of antitrust and patent law infringement and in reliance of the liberal federal rules for pleading

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stated its claim as follows:

"A declaratory judgment that the Licensing Agreement is illegal, null and void as an undue restraint on trade and against public policy and, in any event, unenforceable against the respondents." (A. 135).

Armor also petitioned:

"That this court retain jurisdiction to hear and determine all of the matters for which arbitration is sought by petitioner and for those new matters alleged herein by respondents." (A. 133).

Subsequently, Armor amplified and detailed its counterclaim with respect to antitrust and patent law violations in its Amended Answer, Counterclaim and Cross-Petition (A. 180).

F. Armor's counterclaims.

In its pleadings, Armor has asserted numerous counterclaims many grounded upon the illegality of the License Agreement because of its violation of antitrust laws for which it seeks treble damages and others grounded upon misrepresentation for which it seeks money damages and rescission.

These claims may be summarized as follows:

- (1) Counterclaims based upon License Agreement being illegal, null and void as an undue restraint on trade and against public

2/ See affidavit of William J. Pastore sworn to November 14, 1975 heretofore filed with this Court in opposition to petitioner-appellee's motion to dismiss.

policy as claimed in the original pleading

(A. 135):

(a) A counterclaim for treble damages under the 15 U.S.C. §§1, 15 and 22; 28 U.S.C. §1338(b) and New York General Business Law §§340 et seq. based upon the fact that the License Agreement violates the antitrust laws of the United States and the State of New York (A. 180), the patents and know-how are not proprietary and a restrictive licensure thereto is illegal (A. 108) and that it violates public policy incorporated in the antitrust laws (A. 191).

In addition Armor seeks:

(b) That the Patents be declared to be invalid and the monopoly of the trademarks and "Know-how" be declared to be illegally extended because of misuse by MVIW under the Agreement in the following respects:

(i) "MVIW has wrongfully extended monopoly control over products and technology which are not protectable;

(ii) "MVIW has wrongfully extended monopoly control over products and technology in territories in which MVIW has no enforceable rights by, through or under its purported 'Know-how', Patents and Trademarks or otherwise;

(iii) "MVIW has extended an illegal monopoly control by MVIW over the 'Licensed Products' beyond the expressed term or useful life of the purported 'Know-how', Patents and Trademarks;

(iv) "MVIW has extended its illegal monopoly control over the 'Licensed Products' by illegally restraining free and public disclosure by Armor of the Patented 'Licensed Products' contrary to and in blatant disregard of United States Patent Laws;

(v) "MVIW has extended its illegal monopoly control over the 'Licensed Products' by requiring Armor and third parties who purchase the 'Licensed Products' from Armor for resale to refrain from questioning or attacking the validity of the Trademarks; and

(vi) "MVIW has extended its illegal monopoly control over the 'Licensed Products' by precluding Armor from contesting the validity and enforceability of the purported 'Know-how' and Patents under the Agreement."

(A. 198-199).

(c) That the Agreement be adjudged in restraint of trade and commerce among the

several States and foreign nations or either of them in violation of Section 1 of the Sherman Act and Section 340 of the New York General Business Law and be declared to be illegal for the following reasons:

- (i) "MVIW has imposed an illegal division of world markets;
- (ii) "MVIW has imposed illegal territorial resale restrictions upon 'Licensed Products' and unlicensed products; and
- (iii) "MVIW has misused its 'Know-how', Patents and Trademarks in wrongfully exerting monopoly control over the 'Licensed Products' as more fully set forth in paragraph 1 of this prayer." (A. 200).

(d) That the Agreement be declared void and unenforceable for the following reasons:

- (i) "MVIW has misused the Patents and illegally extended the monopoly of the 'Know-how' and Trademarks in the inducement and execution of the Agreement;
- (ii) "The Agreement violates Section 1 of the Sherman Act and Section 340 of the New York General Business Law as more particularly set forth in paragraph 2 of this prayer;
- (iii) "The technical information comprising the 'Know-how' with respect to the 'Licensed Products' was

known to or should have been known to MVIW and E.P.L. during the negotiations and at the execution of the Agreement to infringe several patents existent and enforceable within the 'Territory' constituting a fraudulent inducement of the Agreement and material breach thereof as of the date of execution; and
(iv) "The Patents made the subject of the Agreement are invalid and unenforceable." (A. 200-201).

(e) That the patent rights allegedly transferred by MVIW and E.P.L. or either of them under the Agreement be declared void and unenforceable." (A. 198 et seq., A. 202).

(2) That the Duplex System presently being developed by Armor be declared not to constitute an infringement of the patent rights or within the scope of the purported "Know-how" of the Agreement. (A. 202).

(3) That the License Agreement be declared terminated, cancelled and rescinded by reason of MVIW's misrepresentations and substantial breaches and that Armor be awarded damages as a result thereof (A. 133-36, 201).

G. Reasons for appeals.

Armor has appealed from these orders for several reasons:

First it seeks a trial of the non-arbitrable antitrust issues because such trial will be required regardless of the outcome of the arbitration. Whereas, on the other hand, a determination of these threshold issues could make the arbitration unnecessary. Furthermore, the antitrust issues (as well as other issues, the non-arbitrability of which the Court has not yet ruled), are so enmeshed with the issues directed for arbitration that the arbitrators must necessarily consider them in arriving at any conclusions and any money award by the arbitrators would require a subsequent arbitration after the District Court action was concluded.

Second, although Armor has asked the District Court to rule on whether or not its counterclaims are to remain with the Court, the Court has failed to do so. The

result is to leave Armor uncertain as to what is and what is not arbitrable and which issues to assert in the arbitration proceeding and which not to assert so as not to waive its rights to a court determination. The arbitration proceeding promises to be conducted in hopeless confusion with neither the parties nor the arbitrators being certain of which issues are arbitrable and which are not and which facts are relevant and which are not. This would be a difficult situation for an experienced trial judge, let alone a panel of arbitrators without judicial experience.

ARGUMENT

POINT I

THE COURT BELOW ERRED BY
FAILING TO DETERMINE WHETHER
OR NOT THE ISSUES RAISED BY
ARMOR ARE ARBITRABLE

Issues involving antitrust violations and patent invalidity as have been raised by Armor in its pleadings are clearly non-arbitrable as a matter of law. Beckman Instru-

ments, Inc. v. Technical Development Corporation, 433 F.2d 55 (75th Cir. 1970); Leesona Corp. v. Cotwool Mfg. Corp., Judson Mills Div., 204 F. Supp. 141 (D.S.C. 1962), aff'd 315 F.2d 538 (4th Cir. 1963); American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1963); A & E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9 Cir. 1968); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 1068 (9 Cir. 1970); Alco Standard Corporation v. Benalal, 345 F. Supp. 14 (E.D.Pa. 1972). In fact the District Court has ruled that all antitrust issues remain with the Court (A. 217).

Article XI, Section 2 of the License Agreement (A. 50) is limited to disputes concerning the payment of money provided for in the agreement or relating to the meaning or application of any of the provisions of the agreement. There is no consent to arbitrate any other matters of dispute arising between the parties, including those matters specifically reserved for the courts in Section 1.

Thus, other issues raised by appellant pertaining to the invalidity of the patent rights, whether MVIW is liable for treble damages for alleged antitrust violations, whether MVIW should be enjoined from continuing the alleged antitrust

violations, whether Armor's Duplex System infringes upon MVIW's patent rights and purported know-how and whether MVIW should respond in damages and the License Agreement terminated because of MVIW's alleged misrepresentations and material breaches are also non-arbitrable because of the limited scope of the arbitration clause. (See Alco Standard Corp. v. Benalal, 345 F. Supp. 14 (E.D.Pa. 1972) re rescission).

As the case now stands Armor has been directed by the District Court to proceed with arbitration without having received a clear statement from that Court as to the arbitrability or non-arbitrability of the issues it has raised. And further, the stay imposed on the court proceedings, will preclude such a statement until after the arbitration is concluded despite the threshold questions involved.

Armor was compelled to assert its counterclaims in this proceeding both by Fed. Rule Civ. Proc. 13(a) and in order to avoid waiving its rights to a trial of non-arbitrable issues. Necchi Sewing Machine Sales Corp. v. Necchi S.p.A., 369 F.2d 579 (2d Cir. 1966); Southern Construction Co. v. United States ex. rel. Samuel J. Pickard, 371 U.S. 57 (1962); United States v. Eastport Steamship Corp., 255 F.2d 795, 803 (2d Cir. 1958).

If it asserts non-arbitrable issues in the arbitration it may be deemed to have waived its right to a court determination of those issues. 6 C.J.S. Arbitration §29. However, having raised the issues, and having failed to receive a determination from the Court as to whether or not the issues are arbitrable, Armor has been placed in the predicament of having to defend against the claims of MVIW in the arbitration without a ruling as to the status of the issues it has asserted.

POINT II

THE STAY OF COURT PROCEEDINGS BY THE COURT BELOW CONSTITUTES AN ABUSE OF JUDICIAL DISCRETION

- A. Non-arbitrable issues are numerous and broad in scope and permeate entire License Agreement making it impossible for arbitrators to consider arbitrable issues only.

The non-arbitrable issues are so numerous and of such nature as to permeate the entire License Agreement and will require the arbitrators to consider non-arbitrable matters in order to reach any conclusions with respect to matters that are otherwise arbitrable. Cobb v. Lewis, 488 F.2d 41, 50 (5 Cir. 1974).

In order for the arbitrators to determine that MVIW is entitled to any payment under the License Agreement they must assume that the entire agreement is valid and should not be declared, in whole or in part, to be illegal, terminated, rescinded or rendered null and void because of the alleged antitrust violations, patent invalidity and misrepresentations on the part of MVIW.

The License Agreement provides for an initial lump sum payment of \$75,000 (Australian) (Article VI(a) at A. 35), which appellant has paid in full and seeks repayment and for annual minimum royalty payments, \$12,500 (Australian) of which appellant has paid (Article VI(d) at A. 37). The agreement does not designate these payments as consideration for performance by MVIW under any particular provision of the Agreement. There is no provision for payment of a specified amount or a specified portion of the annual minimum royalty payments as consideration for the grant of the patent license and another specified amount for furnishing technical know-how and another specified amount for the use of the trademarks. Instead, the payments constitute consideration for MVIW's overall performance. Thus, if the arbitrators find Armor has failed to

make payment under the agreement, they will be faced with the following dilemma: they will have to ignore all issues of anti-trust illegality and patent invalidity and render an "all or nothing" award with respect to payments, solely based upon their interpretation of contract clauses, or, in the alternative, to consider the non-arbitrable claims of Armor and make a determination allocating what portion of the initial payment or the annual minimum royalty payments are due MVIW or returnable to Armor as the case may be.

If the arbitrators adopt the first course of action, the District Court, when it ultimately considers the non-arbitrable issues raised by Armor, will have to determine whether the entire agreement or any portion of it is illegal, whether the illegal portions are severable and what portion of the arbitrators' award is affected by such illegality. Thus, the determination of the arbitrators with respect to payment would no longer be applicable and the time, effort and expense of the arbitration would have been completely wasted.

If the arbitrators were to follow the second course, and were to decide what portion of the initial payment and the annual minimum royalty payments should be awarded, they must necessarily consider non-arbitrable matters.

If the arbitration proceeding is not stayed pending a determination by this Court of the issues raised by Armor, the arbitrators and parties will be faced with enormous difficulties as to what issues are properly before the arbitrators and what issues are not and as to what evidence the arbitrators may or may not entertain, a result that is unnecessarily burdensome. Wyatt Earp Enterprises v. Sackman, 157 F. Supp. 621 (S.D.N.Y. 1958).

B. A trial in the District Court will be required regardless of outcome of arbitration proceedings.

As urged above, if the arbitrators find that Armor has breached the License Agreement, a trial will be required as to the issues of illegality, patent invalidity and rescission and possibly a second arbitration will be required.

But, even if the arbitrators find that MVIW has breached the License Agreement and Armor is not in default in any of its payments thereunder, a trial in the District Court will be required to consider issues raised by Armor in its pleadings as to whether:

a) the patent rights allegedly transferred under the Agreement should be declared void and unenforceable;

b) the antitrust laws have been violated and if so whether Armor is entitled to treble damages;

c) the Duplex System presently being developed by Armor should be declared not to constitute an infringement of the patent rights or within the scope of the purported know-how of the License Agreement;

d) MVIW and related persons or corporations and those acting in their behalf should be enjoined from performing any acts that would serve to continue the alleged violations of the Sherman Act and the New York General Business Law; and

e) the License Agreement should be declared terminated, cancelled, rescinded and rendered null and void by reason of MVIW's misrepresentations and substantial breaches and whether damages resulting thereupon should be awarded to Armor.

C. Illegality of License Agreement because of Antitrust Violation is apparent on its face and vitiates entire agreement including the arbitration clause.

Armor has alleged that the License Agreement violates the antitrust laws of the United States and the State of New York on numerous grounds. Some of these issues, as well as other non-arbitrable issues raised by Armor, will require extensive proof at a trial.

However, the claim that MVIW has illegally extended its monopoly control over products and technology by imposing illegal territorial resale restrictions is apparent on the face of the License Agreement.

In Article II(e) it is provided:

"Armor shall not export or allow or suffer to be exported outside the Territory, directly or indirectly or through any Sales Affiliate or Subsidiary, any Licensed Products or Gearless Elevators employing the Licensed Products or manufactured directly or indirectly by Armor." (Emphasis added). (A. 25).

The term, "Sales Affiliate" is defined at Article I(G) as follows:

"Sales Affiliate" with respect to Armor, shall mean any Person carrying on business in the Territory to which Armor shall sell the Licensed Products or Gearless Elevators employing the Licensed Products for the purpose of resale, provided, however, that except with MVIW's prior written specified approval nothing contained in this Agreement shall be construed to permit Armor to sell or lease the Licensed Products or Gearless Elevators employing the Licensed Products to or through any Sales Affiliate located in and carrying on its business in the Territory for installation in a building located therein and which Sales Affiliate shall, prior to its advertising, selling or installing any such Gearless Elevators employing the Licensed Products, execute and deliver to MVIW an instrument in writing agreeing to be bound by the terms of this paragraph." (Emphasis added). (A. 22).

Thus, under the License Agreement, Armor is not permitted to sell or lease the Licensed Products or Gearless Elevators employing the Licensed Products for the purpose of resale, unless sold for installation in a building located in the "Territory" and unless the party to whom Armor sells the product agrees in writing to be bound by the terms of the License Agreement concerning territorial resale restrictions.

This provision prima facie is a clear violation of the Sherman Act and §340 of the New York General Business Law and as such the Agreement is illegal on its face. United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973); United States v. Schwinn Co., 388 U.S. 365 (1967); Ansul Company v. Uniroyal, Inc., 448 F.2d 872 (2d Cir. 1971); Redd v. Shell Oil Co., 184 U.S.P.Q. 675 (D. Utah, 1974); Clairol Inc. v. Cosmetics Plus, 184 U.S.P.Q. 234 (N.J. Sup. Ct. Chancery Div. Hudson Co. 1974).

A violation of the antitrust statute that is so apparent on the face of the contract must completely vitiate the contract for illegality and preclude a reference to arbitration. Varo v. Comprehensive Designers, Inc., 504 F.2d 1103 (9 Cir. 1974) Ring v. Spina 148 F.2d 647, 650 (2 Cir. 1945).

CONCLUSION

1. The stay of District Court proceedings should be vacated and arbitration proceedings stayed until the court proceedings are concluded because:

(a) a trial will be required regardless of the outcome of the arbitration; (b) any award the arbitrators make in favor of MVIW must be contingent upon the District Court's determination of non-arbitrable issues; (c) in the event of a money award by the arbitrators in favor of MVIW a complete rehearing would be required after the court's determination of non-arbitrable issues; and (d) the non-arbitrable issues are numerous and broad in scope and permeate the entire agreement.

If the arbitration proceeding precedes the proceedings before the District Court, a great amount of time and expense will have been needlessly expended.

On the other hand, a trial of non-arbitrable issues might dispense with the need for arbitration.

Under these circumstances it is respectfully urged that this Court determine that the District Court abused its judicial discretion by ordering a stay of the court proceedings.

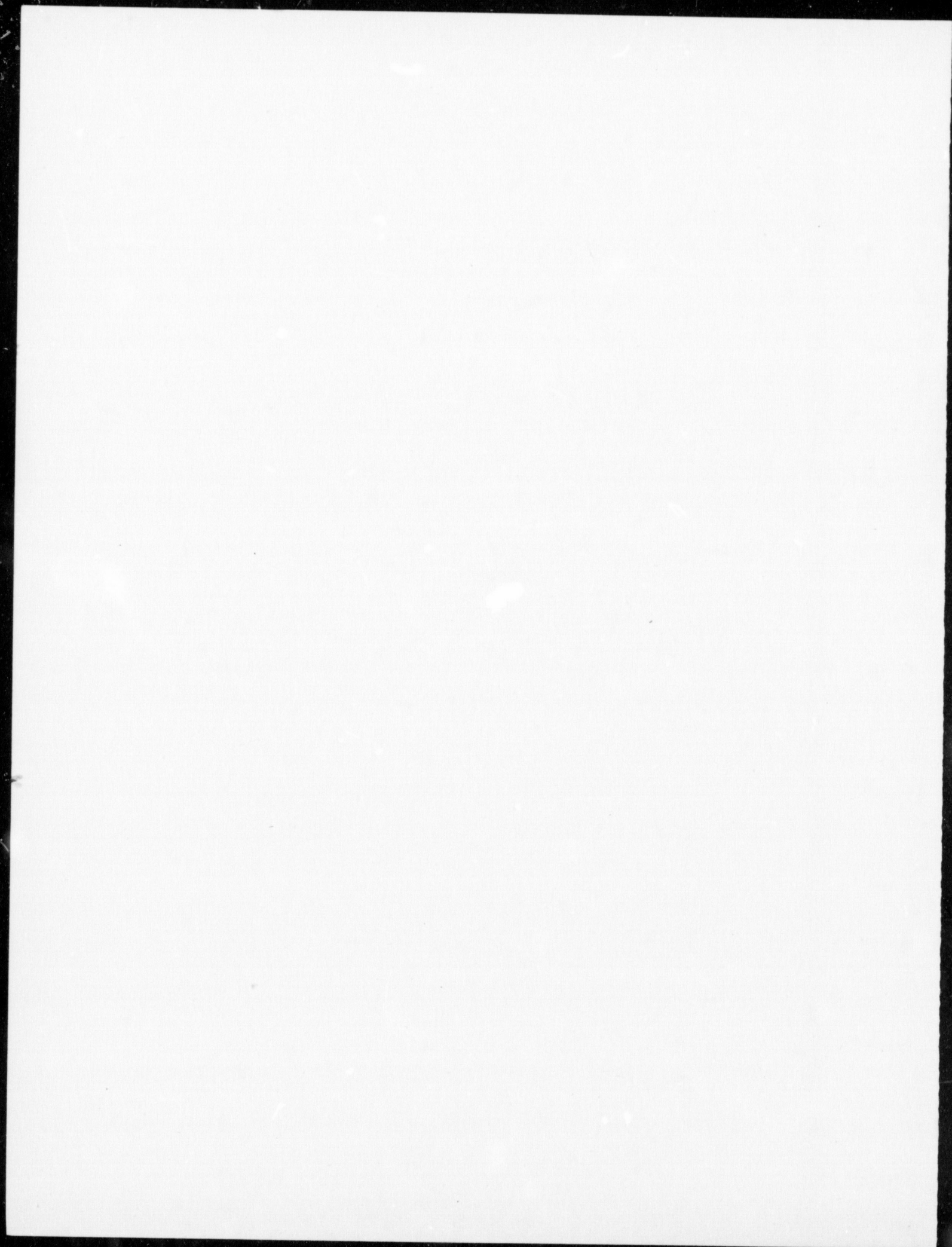
2. In the event this Court affirms the District Court's stay of court proceedings and direction to proceed with arbitration it is respectfully urged that a determination be made as to which of the issues raised by Armor are non-arbitrable and which are arbitrable.

Dated: New York, New York
November 28 , 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

N. V. MAATSCHAPPIJ VOOR INDUSTRIELE
WAARDEN,

Petitioner-Appellee,

against

A. O. SMITH CORPORATION,

Respondent,
and

ARMOR ELEVATOR COMPANY, INC.,

Respondent-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes
and says that he is over the age of 18 years. That on the 28th
day of November, 1975, he served two copies of the
Brief for Respondent-Appellant Armor Elevator Co on
Spitzer & Feldman, P.C.

the attorney s for the Petitioner-Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney s at
No. 595 Madison Avenue, New York () N. Y.,
that being the address designated by t h e m for that purpose upon
the preceding papers in this action.

David F. Wilson
.....

Sworn to before me this

28th day of November, 1975.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976